BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTINE BRADY	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	Docket No. 1,024,085
Respondent	)	
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the September 19, 2012, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on February 13, 2013. Judy A. Pope, of Leawood, Kansas, appeared for claimant. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent and the State Self Insurance Fund (respondent).

The Administrative Law Judge (ALJ) found claimant had a 10 percent permanent partial impairment to the body as a whole.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant asserts the rating opinion of Dr. William Hopkins is the most credible and the Board should find she has a 20 percent permanent partial impairment to the whole body.

Respondent contends claimant has a 5 percent permanent partial impairment to the whole body.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is employed by respondent at the Kansas Neurological Institute (KNI) as a client training supervisor. On January 24, 2004, claimant was helping a direct support staff member lift an individual from a wheelchair to a changing table. Claimant had the upper part of the individual's body and the staff member had the lower half. As they were laying the individual on the changing table, the staff member let go of the individual. Claimant then took the full load of the individual and got her safely onto the changing table. Claimant then lowered herself to the floor. She felt as though someone had crushed her spine.

Claimant has been treated by a number of physicians. She still has a sharp pain in her low back. Her low back is sensitive to touch. The pain goes to the left side of claimant's hip and down the left leg to the toes and the bottom of her foot. She has back spasms. Her condition has worsened since the accident. She has been unable to work her regular duties since the accident of January 24, 2004, and now claimant does supervisory duty and paperwork only. Claimant can no longer help with the direct support staff.

Dr. Joseph Sankoorikal, a board certified physiatrist, is claimant's authorized treating physician. He first examined claimant on August 27, 2007, at the request of her attorney. Claimant had already undergone epidural injections from treatment provided by a previous physician. Dr. Sankoorikal's impression was that claimant had disc bulges at L4-5 and L5-S1. Over the next few months, he provided chronic pain management with medications, physical therapy, and education. On December 17, 2007, Dr. Sankoorikal rated claimant's impairment at 5 percent to the whole body based on the AMA *Guides*.[1] At that time, claimant's complaint was mostly low back pain. She had some radicular symptomatology, but her neurological examination was normal. Dr. Sankoorikal had not done an EMG or MRI.

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

After Dr. Sankoorikal rated claimant, she returned for more treatment. On December 4, 2009, Dr. Sankoorikal performed an EMG, which indicated claimant had minimal radiculopathy at L5-S1. Dr. Sankoorikal said the positive EMG findings could be attributed to the disc bulge at two levels, the type of work claimant does, and her age. He said there might have been progression over the course of time since the accident, or the findings could have been there earlier but not noticed because an EMG was not done.

On August 18, 2010, claimant reported to Dr. Sankoorikal that she had a couple of episodes of bowel incontinence and urinary urgency. Dr. Sankoorikal last saw claimant on June 1, 2012, at which time claimant complained of urgency and being incontinent. Dr. Sankoorikal did not believe claimant had cauda equina syndrome and has not referred claimant for any treatment or evaluation of cauda equina symptoms. He defined cauda equina syndrome as involvement of the lowest part of the spinal column and said it is a very serious situation and bladder and bowel impairment, lack of control and incontinence are present. The individual will get numbness and tingling along the private area like a saddle-type impairment. Dr. Sankoorikal said it is an emergency-treatment situation.

Dr. Sankoorikal said it would be to claimant's benefit to remain under a doctor's care, and he plans to continue monitoring claimant's pain and medication. He said once in a while, claimant might need injections and continuing education of her biomechanics. He has assigned permanent sedentary restrictions to claimant.

When Dr. Sankoorikal rated claimant in 2007, he did not have the benefit of the EMG tests or the MRIs since completed. He believes claimant's problems started with her accident at work in January 2004 and her problems have become worse, with some fluctuation of good and bad days. Dr. Sankoorikal said his rating of claimant's impairment would increase if he performed another rating examination.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant at the request of the ALJ. He authored four reports in this case. Dr. Prostic first examined claimant on November 5, 2008. At that time, claimant had symptoms of mild left S-1 radiculopathy. The basis for claimant's symptoms was degenerative disc disease in her lower lumbar spine. Radiculopathy had not been confirmed by EMG or other clinical test. Dr. Prostic felt claimant was at maximum medical improvement (MMI) at that time. Based on the AMA *Guides*, Dr. Prostic placed claimant in DRE Lumbosacral Category III, a 10 percent impairment.

When Dr. Prostic saw claimant a second time on September 16, 2009, her range of motion was worse. Dr. Prostic recommended psychological testing to see if there was an emotional contributor to claimant's symptoms, as he believed the loss of motion of

claimant's lumbar spine was out of proportion to what he expected. After the psychological testing was finished, Dr. Prostic reviewed the report and said the testing showed claimant had psychological barriers to improvement. His report of September 25, 2009, stated:

> Unless an obvious lesion is noted on MRI, it is very unlikely that the patient would have beneficial response to additional injections or surgery. She is more likely to be improved by the combination of anti-depressant medicines by mouth and a gentle exercise program. Her impairment continues to be rated at 10% of body as a whole on a functional basis.[2]

Dr. Prostic authored a fourth report on October 6, 2009, after he had seen the results of a lumbar MRI performed on October 5, 2009. Dr. Prostic stated:

> It [the MRI scan] does show interval change from the examination of November 14, 2006 with bulge and annular tear at L4-5 and asymmetric to the left broad-based bulge of disc at L5-S1 with foraminal stenosis. These findings are competent to cause some of the symptoms reported by Miss Brady.[3]

Based upon the description of the MRI in 2006 as compared to a study in 2004, Dr. Prostic opined claimant's 2006 accident had aggravated preexisting degenerative disc disease. His review of the reports of the MRIs and EMG performed subsequent to his rating confirmed his original 10 percent impairment rating.

At the request of her attorney, claimant was examined by Dr. William O. Hopkins, a board certified orthopedic surgeon, on March 19, 2012. Claimant's chief complaints were severe low back pain with burning sensations up to the middle of her back and back spasms. She also complained of pain and numbness in her left leg down to her foot, weakness in her left leg, and rectal pressure making it difficult to eliminate. Claimant said she had lost bowel control three times in the last three years. She can sit for one to two hours, but can only stand about two minutes before her pain increases. She can walk up to two miles. She has difficulty lying down, walking, and attempting to run or stoop, squat, bend, kneel, lift and carry. She has trouble pushing, pulling, reaching and twisting, as well as ascending and descending stairs.

Dr. Hopkins reviewed the reports of claimant's various MRIs and concluded that claimant's areas of complaints were consistent with the MRI reports. He reviewed

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[2] Prostic Depo., Ex. 1 at 6.

[3] *Id.* at 7.

claimant's medical records from the accident and found the various doctors to be consistent in their analysis of claimant's condition.

The report of claimant's November 14, 2006, MRI indicated she had abnormalities at L3-4, L4-5 and L5-S1. L3-4 did not have a significant bulge, but there was an annular tear at L4-5, and she had facet disease. Mild foraminal narrowing was present, greater on the left than right. The radiology report indicated claimant had a moderate, broad-based annular bulge at L5-S1, mild to moderate degenerative disc disease, and facet disease with mild to moderate right and moderate to severe left foraminal narrowing. These were objective findings and were anatomically appropriate for the type of symptoms claimant had. Dr. Hopkins said the EMG done December 4, 2009, also provided objective evidence consistent with claimant's low back and left leg complaints, as did the MRI performed on May 24, 2011.

When Dr. Hopkins examined claimant, she was in significant pain. He said claimant was so genuinely in pain, he felt he could increase her pain by attempting to accurately measure every type of back motion necessary. Dr. Hopkins found claimant's complaints of rectal pain and periodic loss of bladder and bowel control to be very significant.

Dr. Hopkins believed claimant's work accident was the prevailing factor in causing injuries to her low back and left leg, as well as her rectal symptoms and loss of control. Using the AMA *Guides*, Dr. Hopkins felt claimant fell into DRE Category IV for a 20 percent permanent partial impairment to the whole body, although he was tempted to place her in a higher category because of her symptoms of loss of bladder/bowel control. Although the *Guides* define loss of structural integrity of the lumbosacral joint as at least 15 degrees more angular motion than at the L4 and L5 motion segment, no flexion/extension x-rays were taken to so document. Dr. Hopkins stated, however, that does not mean the loss of motion segment integrity was not there and that if claimant has joint disease, she has loss of integrity of the joint. Dr. Hopkins said he can also use his professional judgment, and if claimant did not fit into one category or another, it was appropriate for him to give an opinion. He noted patients with a cauda equina-like syndrome with objectively demonstrated permanent partial loss of lower extremity function bilaterally are to be placed in DRE Category VI. Dr. Hopkins said claimant does not quite get to the bilateral level, which is one of the reasons he did not go to Category VI.

Dr. Hopkins believes his rating is more credible than claimant's previous ratings because he saw her at a much later time. He said claimant had persistent symptoms and persistent pain, and those worsened over time. Dr. Hopkins did not believe claimant had reached MMI by September 2009, when she was rated by Dr. Prostic. Dr. Hopkins

believes claimant should remain under the care of a pain specialist. Further, claimant should remain at a sedentary level of physical duties.

Claimant admitted she had suffered a back injury while working at KNI in 1990. She was off work three years from that injury. She was treated for a back injury, but a lot of the pain was in the left hip. Claimant had some injections in her thigh and buttock areas and acupuncture for those injuries. She filed a claim against respondent and received a settlement. Dr. Hopkins said although claimant may have missed three years of work from the 1990 work-related accident with injuries to her back, by history claimant got better.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-501(a) (Furse 2000) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-508(g) (Furse 2000) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[4] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[5]

The only issue to be determined by the Board is whether claimant sustained a 10 percent whole body or a 20 percent whole body impairment. Dr. Sankoorikal provided the opinion that claimant suffered a 5 percent whole body impairment in a report dated December 17, 2007. Dr. Sankoorikal did not testify that the rating represented claimant's condition when he last examined her on June 1, 2012. As such, Dr. Sankoorikal's rating will be given no weight.

Dr. Prostic testified that claimant has a 10 percent whole body impairment. The only evidence in the record that claimant experiences a 20 percent impairment is the testimony of Dr. Hopkins. Dr. Hopkins assessed his rating on the basis of loss of motion segment

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[4] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2011).

[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

integrity, which places claimant within DRE Category IV of the AMA *Guides*.[6] The relevant portions of the Guides were placed into evidence in the depositions of Dr. Prostic and Dr. Hopkins. In order to find loss of motion segment integrity, the AMA *Guides* state:

> A motion segment of the spine is defined as two adjacent vertebrae, an intercalated disk, and the vertebral facet joints. Loss of motion segment or structural integrity is defined as abnormal back-and-forth motion (translation) or abnormal angular motion of a motion segment with respect to an adjacent motion segment.
>
> The loss of integrity is defined as an anteroposterior motion or slipping of one vertebra over another greater than 3.5 mm for a cervical vertebra or greater than 5 mm for a vertebra in the thoracic or lumbar spine (Fig. 52, at right); or a difference in the angular motion of two adjacent motion segments greater than 11° in response to spine flexion and extension (Fig. 63, at right). Motion of the spine segments is evaluated with flexion and extension reontgenograms. Loss of integrity of the lumbosacral joint is defined as an angular motion between L-5 and S-1 that is 15° greater than the motion at the L-4, L-5 level.[7]
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> Flexion and extension comparison roentgenograms show significant injury-related anterior-to-posterior translation of two adjacent vertebral bodies of 5 mm or more in the lumbar or thoracic spine . . . .[8]

In a nutshell, the AMA *Guides* require flexion and extension x-rays to support a finding of loss of motion segment integrity. Dr. Hopkins testified that claimant had loss of motion segment integrity "just by her degenerative changes."[9] He also stated that "no one did an [*sic*] flexion/extension views at that time."[10] Later in his testimony, Dr. Hopkins agreed there were no studies to document loss of motion segment integrity. Based upon the lack of flexion and extension x-rays as required by the AMA *Guides,* the Board gives Dr. Hopkins' rating no weight.

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[6] Hopkins Depo. at 27 and Ex. A at 1.

[7] Prostic Depo., Ex. 2 at 1.

[8] Hopkins Depo., Ex. A at 2.

[9] Hopkins Depo. at 35.

[10] *Id.*

CONCLUSION

Based upon the foregoing, the Board finds claimant has failed to sustain the burden of proving she has a 20 percent impairment. The Board agrees with the assessment of the ALJ that Dr. Prostic's 10 percent whole body rating is credible and adopts the same.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated September 19, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge